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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 753

CARL B. GEORGE

Petitioner,

vs.

C. M. LEONARD AND LEONARD CONSTRUCTION COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

Petitioner Carl B. George, respectfully prays certiorari to review a decision of the United States Court of Appeals for the Fourth Circuit reversing a judgment of the United States District Court for the Eastern District of South Carolina in favor of petitioner and remanding the case with a direction to enter judgment for respondents (R. 300), one judge dissenting (R. 305).

Summary Statement of the Matter Involved

This case involves an action for malicious prosecution brought by petitioner against respondents in the United

States District Court for the Eastern District of South Carolina (R. 3) and tried to a jury, which returned a verdict for petitioner in the amount of Fifteen Thousand Dollars ($15,000) (R. 187) on which judgment was entered (R. 189) Respondents made a motion to set aside the judgment (R. 190) and the Court wrote an opinion discussing the applicable law, and denied the motion (R. 190).

From this order the respondents appealed to the United States Court of Appeals for the Fourth Circuit, and the majority of that Court reversed the judgment and remanded the case with directions to enter judgment for respondents (R. 300). A dissenting opinion was written (R. 305). Petitioner then petitioned said Circuit Court of Appeals for a rehearing (R. 312), which petition was denied.

Petitioner had been assistant manager of respondents' farm in South Carolina (R. 17) where a large number of turkeys were being raised (R. 17). Respondents' superintendent, Boykin, rigged up a case to have some of respondents' turkeys purchased from petitioner by a member of the state constabulary (R. 87) and then had a warrant issue charging petitioner with fraudulent breach of trust (R. 94), whereupon petitioner was arrested and put in jail and later released on bail (R. 95). Then in order to get more money out of petitioner, knowing his financial condition and the urgency of his employment situation, Boykin, respondents' superintendent added further claims (R. 160), then took Four Hundred Fifteen Dollars ($415.00) from petitioner and had the warrant dismissed (R. 161).

Petitioner had previously applied for a position at Shaw Field in South Carolina and had to report for duty by the first of September or lose the job (R. 21). Petitioner explained this to Boykin (R. 27) who demanded that he pay Four Hundred Fifteen Dollars ($415.00), which he

did, saying that he was innocent and was paying the money under protest because he had to get away to take the position at Shaw Field (R. 27-29). The warrant was then dismissed at Boykin's instance (R. 29). Petitioner was greatly humiliated (R. 30).

Subsequently petitioner filed actions in the aforesaid District Court against respondents for abuse of process and malicious prosecution (R. 3, 186). In the abuse of process case, the trial court directed a verdict against petitioner; he appealed to the U. S. Court of Appeals for the Fourth Circuit, and that Court reversed the decision of the trial court. (Reported 169 F. (2d) 177.) On retrial of the abuse of powers case petitioner obtained judgment for Four Hundred Fifteen Dollars ($415.00) (R. 188), which has been paid (R. 189).

In the instant case, i.e., the malicious prosecution case, petitioner obtained judgment on verdict of a jury, in the amount of Fifteen Thousand Dollars ($15,000.00) (R. 187, 189). Respondents appealed from this judgment to the United States Court of Appeals for the Fourth Circuit, and that Court reversed, one judge dissenting, on the ground that by paying the sum of $415.00 to effect his release, petitioner had precluded himself from maintaining an action for malicious prosecution (R. 300).

The Evidence

Probably a discussion of the evidence is unnecessary and would be unwelcome, at least at this stage of the proceedings, since no contention has been made by respondents that petitioner failed to carry the burden of proof as to all the elements of a malicious prosecution case. The opinion of the United States Court of Appeals in the case of *George* v. *Leonard, et al.*, the malicious abuse of process case, reported at 169 F. (2d) 177, and the opinion of that

Court in the instant case, No. 5949 in the United States Court of Appeals for the Fourth Circuit, (R. 300) give a sufficient recital of the evidence for the purposes of this petition.

Jurisdiction

The judgment of the United States Court of Appeals was entered December 8, 1949, and motion for rehearing was denied January 14, 1950. Jurisdiction of this Court is invoked under Title 28, sec. 1254, United States Code.

Question Presented

The sole question presented is whether a person who has been arrested on a criminal charge, brought against him maliciously and without probable cause, is barred from maintaining his action for malicious prosecution by having paid his false accuser a sum of money in order to effect his release, at the same time protesting his innocence and saying he was being held up and was paying the money under protest only because he had to get away to take a position.

Reasons Relied upon for Allowance of Writ

The United States Court of Appeals based its decision on a misconception of the applicable South Carolina law.

Prayer

Petitioner prays that a proper Writ of Certiorari be issued, directed to the United States Court of Appeals for the Fourth Circuit, that this cause may be reviewed and reversed, and that such other relief be granted as may be proper.

Respectfully submitted,

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BRIEF IN SUPPORT OF PETITION

Jurisdiction

The jurisdiction of this Court is invoked under Title 28, sec. 1254, United States Code.

Statement of the Case

This is a malicious prosecution case, in which petitioner recovered a judgment on a jury verdict in the United States District for the Eastern District of South Carolina in the amount of Fifteen Thousand Dollars ($15,000) (R. 187, 189). Respondents appealed to the United States Court of Appeals for the Fourth Circuit, and that Court reversed, one judge dissenting, on the ground that petitioner's action had been barred by his having paid a sum

of money to respondents to effect his release (R. 300). The payment was made under protest, the petitioner saying he was innocent, that he was being held up, and was making the payment only because he had to report for work on a new position at the nearby air field the following day, per the Court's opinion (R. 300).

Specification of Errors

The United States Circuit Court of Appeals for the Fourth Circuit erred in holding that under South Carolina law a malicious prosecution action is barred by payment by a defendant in a criminal case to his prosecutor, made under protest, while he was protesting his innocence of the crime charged, and saying that he was being held up, and was paying only because he had to get away to take a position.

Argument

The dismissal of the warrant under the circumstances of this case was a sufficient termination of the proceedings to entitle the petitioner to maintain his action under the law of South Carolina.

The dismissal was at the request of the prosecution. In order to effect his release, petitioner signed a paper drawn by respondents with a special view of attempting to have petitioner admit guilt, and paid over a sum of money under protest, which was subsequently recovered from respondents as an illegal exaction (R. 186, 189).

The case of *Jennings* v. *Clearwater Mfg. Co.*, 171 S. C. 498, 172 S. E. 870, which is cited and quoted from in the majority opinion of the United States Court of Appeals, bears out petitioner's side of the case, rather than that of the respondents.

This case is governed by the law of South Carolina which

recognizes not only the general rule that dismissal of a criminal proceeding as the result of compromise usually precludes action for malicious prosecution, but also follows the equally well recognized exception to the general rule that such rule "is not applied in cases where the settlement was not voluntarily and understandingly made, but was made under coercion or duress". *Jennings* v. *Clearwater Mfg. Co.*, 171 S. C. 498, at page 506. Of course there is no settlement when one of the parties acts under duress, coercion, or undue compulsion as in this case. *White* v. *International Text Book Co.*, 156 Iowa 210, 136 N. W. 121, 42 L. R. A. (N. S.) 346, is a leading case.

The majority opinion of the Court of Appeals in the instant case stated (R. 301, 305): "There is evidence that, at the time of the settlement and dismissal of the criminal case, plaintiff protested his innocence of the crime charged and stated that he was being held up and making payment under protest because he had to get away. He testified that he had obtained a position at a nearby airfield and had to report next day to obtain the position." The language of the Court below is in itself sufficient to bring this case within the above exception to the general rule as recognized by the Courts of South Carolina in cases of malicious prosecution. The question of whether the money this petitioner paid respondents was wrung from him under duress was decided affirmatively by the jury so we have here no question regarding this protest. There is no authority in South Carolina that holds that payment under protest is an unfavorable termination and the majority opinion of the Court of Appeals cites no South Carolina case or any authority to the contrary from any other state. The court below failed to apply the South Carolina law.

In *Jennings* v. *Clearwater Mfg. Co.* the prosecution requested the dismissal, but when sued for malicious prose-

cution, argued that the dismissal was not such a termination of the criminal action as to support a malicious prosecution case. The Supreme Court of South Carolina rejected that contention, and in its opinion quoted from the case of *Harrelson* v. *Johnson,* 119 S. C. 59, 111 S. E. 882,

> "that the remedy accorded a citizen of damages for a malicious prosecution is intended to prevent and redress the malicious abuse of the process of the law, and that when the particular proceeding instituted in malice had been legally terminated, the remedy of the injured party has matured; he is not required to await an acquittal, an adjudication of his innocence, which may never come, and may be purposely prevented. A contrary ruling would permit a maliciously disposed prosecutor to hale the defendant before every magistrate in the country or before the same magistrate a dozen times, and be immune from damages by allowing the case to be dismissed by the magistrate."

The warrant on which petitioner was arrested was based on an entrapment rigged by respondents with the state constabulary (R. 88).

The trial court and the jury believed there was not probable cause for initiating the prosecution, and that there was malice on the part of respondents.

The trial court and the jury estimated the effect of the prosecution on petitioner's mind, and believed that he paid a sum of money, not as an indication of guilt, but in order to get away to take a needed position that he would lose if he could not report the following day.

Respondents had their chance to retry the facts of the criminal case in the malicious prosecution case. The evidence they would have given in the criminal case, if it had been allowed to go to trial, was given by respondents in the malicious prosecution case; but it could not take away the preponderance of petitioner's evidence as show-

ing that the prosecution was instigated without probable cause and with malice. Much less could respondents have shown that petitioner was guilty beyond a reasonable doubt.

As was pointed out in petitioner's petition for rehearing (R. 312), the majority of the United States Court of Appeals assumed as universal a rule that is not in effect in South Carolina (R. 314). If the South Carolina rule had been understood and followed by the Court below, the judgment would have been affirmed.

Conclusion

Wherefore, it is respectfully submitted that the writ of certiorari should issue, as prayed.

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